IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1992 of 2001
WITH
SPECIAL CIVIL APPLICATION No 1993 of 2001
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For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHETH BROTHERS

Versus

JOINT COMMISSIONER OF INCOME - TAX

Appearance:
MR SN SOPARKAR for Petitioner
MR AKIL QURESHI FOR MR MANISH R BHATT
for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE D.A.MEHTA

Date of decision: 22/06/2001

CAV. COMMON JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1 "It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as the income-tax assessment orders are concerned, they cannot be reopened on the score of income escaping assessment under section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment". This approach is propounded by the Apex Court in the case of Parashuram Pottery Works Co.Ltd. Vs. Income Tax Officer, Circle I, Ward I, Rajkot reported in 106 I.T.R.1. We may examine the present petition in light of this proposition laid down by the Apex Court.

2. The petitioner is a registered partnership firm. The relevant assessment years are 1990-91, 1991-92 and 1992-93. As the facts for all the three years are similar, at the request of both the sides all the three petitions were heard together and are being disposed of accordingly by this common judgment.

3. For assessment year 1990-1991, the relevant previous year ended on 31/3/1990. On 29/10/1990, the return of income declaring total income of Rs.36,41,000/- was filed by the petitioner firm, and after scrutiny an assessment was framed under section 143(3) of the Act, on 25/3/1991 on total income of Rs. 36,42,600/-. It appears that thereafter revisionary proceedings were initiated and order under section 263 of the Act was passed on 25/3/1993, whereby the assessment order dated 25/3/1991 was set aside on the ground that deduction under sections 80HH and 80I had been erroneously allowed in the said assessment.

4. On 29/3/1994, a fresh assessment was framed under section 143(3) read with section 263 of the Act and the deductions under sections 80HH and 80I were withdrawn on the ground that audit reports had not been filed along with the returns of income. The petitioner carried the matter in appeal before the Commissioner of Income Tax (Appeals), Rajkot who vide his order dated 22/7/1996 allowed the petitioner's appeal following Gujarat High Court decision in the case of Commissioner of Income Tax Vs. Gujarat Oil and Allied Industries 201 I.T.R.325.

5. On 5/2/2001, the impugned notice (Annexure "A") under section 148 of the Act, has been issued by the respondent stating that income Rs.27,13,558/- in respect of which the petitioner is assessable/chargeable to tax for assessment year 1990-91 has escaped assessment within the meaning of section 147 of the Income Tax Act,1961. The said notice further states that the notice has been issued after obtaining necessary satisfaction of the Joint Commissioner of Income Tax, SR-2, Rajkot/Central Board of Direct Taxes. It is this notice which is under challenge in this petition.

6. The petitioner's case in brief is that as the reassessment is sought to be made beyond a period of four years, in view of the Proviso to section 147 of the Act, it is for the Assessing Officer to show that there is any failure or omission on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment for the assessment year in question. It is further contended that as the assessment was originally framed under section 143(3) of the Act and thereafter subjected to revisionary proceedings under section 263 of the Act, the respondent cannot assume jurisdiction to issue the impugned notice.

7. When the aforesaid petitions came up for hearing on 19/3/2001, the notice was made returnable on 9/4/2001 but as the aforesaid petitions could not be taken up on 9/4/2001, the same were taken up on 10/4/2001 and in view of the affidavit-in-reply filed on behalf of the respondent, it was felt necessary that the original file of assessment should be produced by the respondent. We shall advert to the facts in this regard in detail a little later.

8. The Income-tax Act,1961 provides for the machinery in Chapter XIV under sections 147 to 153 for the assessment of escaped income in certain circumstances. The fundamental underlying these provisions of the Act is to see that the entire income of

an assessee assessable in respect of a particular assessment year is subjected to one single assessment for that particular year. Income which is assessable in one assessment year cannot be brought to tax in another assessment year for any reason. The Act does not contemplate piecemeal assessment; one assessment in relation to a portion of the income and another in respect of another portion. However, it is possible that no assessment for a particular year has been completed by the Assessing Officer on the assessee within the period of limitation resulting into escapement of income. Moreover, even where assessment has been made on an assessee, it is found that certain income has escaped assessment therefrom. In order to bring such escaped income to tax, the completed assessment is required to be reopened and it has to be redone in order to include the escaped income so that the income of that particular year is assessed accordingly.

9. Before the Assessing Officer can initiate any proceedings under section 147 of the Act, he is required to establish existence of jurisdictional facts. The Supreme Court in case of Calcutta Discount Co.Ltd. vs. ITO & Anr.(1961) 41 ITR 191 (SC) has stated thus :

> "That to confer jurisdiction under section 34 to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year, two conditions had to be satisfied. The first was that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income-tax had been underassessed. The second was that he must also have reason to believe that such "underassessment" had occurred by reason of either (1) omission or failure on the part of an assessee to make a return of his income under section 22, or (2) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions were conditions precedent to be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or reassessment beyond the period of four years but within the period of eight years, from the end of the year in question".

9.1 This Court in case of P.V.Doshi Vs. CIT (1978) 113 ITR 22 (Guj) stated :

"The conditions precedent for initiating reassessment proceedings are : (1) reasonable belief reached by the Income-tax Officer under clause (a) or clause (b) of section 147; (ii) recording of reasons by the Income-tax Officer under section 148(2); (iii) sanction before issuing the notice of reassessment by the higher authorities under section 151. These three conditions have been introduced by way of safeguards in public interest so that the finally concluded proceedings, which at the time of the original assessment could be reopened through the initial procedure of appeal, revision or rectification before the assessment became final, could not be lightly reopened with the consequent hardship to the assessee and also unnecessary waste of public time and money in such proceedings. These conditions have, therefore, to be treated as being mandatory ....."

9.2 Apart from the factor of recording of reasons being mandatory, this aspect has been explained from a different perspective in a recent decision rendered by Gujarat High Court in the case of Desai Bros. Vs. Dy.CIT (1999) 240 ITR 121 (Guj), the necessity of recording reasons has been elaborately explained in the following terms :

"The requirement of recording of reasons before issuance of notice is to provide a safeguard against the arbitrary action that may be taken by reopening a completed assessment time and again on irrelevant considerations. Recording of reasons unfolds the process by which the Assessing Officer was led to the formation of his belief about escapement of income. If the action of the Assessing Officer is founded on some material or ground that has no nexus to the formation of reason to believe or is not founded on any existing material the same is liable to be interfered with. The correctness of his tentative opinion is not to be tested on the anvil of the final decision which may be reached after considering rival contentions and weighing them through the process of reasoning. But at the same time, if it appears from the reasoning which has been adopted by the Assessing Officer that no inference of escapement of income from assessment can at all be drawn therefrom, it must be held that the action is ultra vires the

statute and does not confer jurisdiction on the Assessing Officer".

9.3 The Income-tax Act is a taxing statute. The provisions of the Act will have to be construed strictly, therefore, unless there is a clear case which would give Assessing Officer jurisdiction to reopen completed assessment as per provisions of sections 148 read with 147, it would not be valid and proper to reopen an assessment, and in case of an assessment which is sought to be reopened otherwise, the same is liable to be struck down. In the case of Desai Bros. vs. Dy. CIT (supra), the phrase "reason to believe" has been explained with reference to a decision of Apex Court in the case of Barium Chemicals Ltd. vs. Company Law Board (1996) 36 Comp. Cas.639 (SC) : AIR 1967 SC 295 whereby it is stated thus :

"Undoubtedly, the word 'reason to believe' relates to process of entertaining an opinion which is subjective in nature and is not liable to be scrutinised by the objective test of judicial scrutiny as in appeal. However, even in the case where an action is founded on subjective satisfaction, the process of entertaining such belief is not bereft of any minimum safeguard against arbitrariness".

The limitation of judicial review where the act is to be founded on subjective opinion on the part of the authority has been succinctly stated by the Apex Court in Barium Chemicals Ltd. Vs. Company Law Board (supra). The Court did not approve the unbridled and unguided operation of the freedom from judicial scrutiny of acts which are founded on formation of subjective satisfaction of the authority empowered to take such action. His Lordship Mr.Justice Shelat (as His Lordship then was) in his opinion stated (pp.688-89) :

"The words 'reason to believe' or 'in the opinion of' do not always lead to the construction that the process of entertaining 'reason to believe' or 'the opinion' is an altogether subjective process not lending itself even to a limited scrutiny by the Court that such 'a reason to believe' or 'opinion' was not formed on relevant facts or within the limits or .... restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative..... It is hard to contemplate

that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process.... If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute".

His Lordship Mr.Justice Hidayatullah (as His Lordship then was) in his concurring opinion stated (page 661) :

"No doubt, the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out...."

9.4 The Supreme Court in the case of Calcutta Discount Co.Ltd. vs. ITO (supra) has pointed out that there are three stages involved in every assessment; (i) disclosure of primary facts, (ii) inferences of facts to be drawn from the primary facts disclosed, and (iii) legal inferences to be drawn from the primary facts disclosed and the inferences of facts drawn from them. The duty of the assessee relates to disclosure of primary facts alone. The duty to find the inferential facts from the primary facts disclosed as well as the duty of drawing inferences of law from the facts found are both

on the Assessing Officer. The disclosure which is required to be made by the assessee should not only be full but also true. The conjunction "and" is an important one and has been interpreted as a strict prescription of law. In case of absence of one of the elements, either in part or in whole, it will grant jurisdiction to the officer.

9.5. The opinion of an internal audit party of the Income-tax Department may or may not be an 'information', depending on the nature of opinion and the factual matrix in which it is set out. At present, the settled legal position is that although an audit party does not possess the power to pronounce on the law, it nevertheless may draw the attention of the Assessing Officer to it. Moreover, an audit party is empowered to point out the facts which may not have been taken into consideration by the Assessing Officer. However, no reappraisal of the same material which had been considered earlier and where an opinion had been formed would be permissible basis to reassess as it would be a case of 'bare or mere change of opinion'.

10. On a reading of a recent decision of this Court in the case of Adani Exports Vs. Dy.CIT : (1999) 240 ITR 224 (Guj), it is seen that the Central Board of Direct Taxes has issued some internal directions to the Assessing Officers to initiate remedial measures by way of reassessment in all cases where audit objections are raised. While dealing with such a situation, the Court referred to and applied the ratio of Supreme Court decision in the case of Indian and Eastern Newspaper Society (supra) and emphasised :

"More importantly, the Court said :

"... in every case, the Income-tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to this notice he can reasonably believe that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. The true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income-tax Officer".

10.1 After extracting the relevant portion from the apex Court decision, this Court has referred to the facts in detail.Thereafter, the Court went on to deal with the Central Board of Direct Taxes instructions as under :

"Notwithstanding this clear position of law emerging from the decision of the Supreme Court, the instructions of the Board still persisted that as soon as audit objections are raised, prompt remedial action in the nature of reassessment should be taken even if objection is not accepted by the Income-tax Officer. The instructions are being taken for remedial action, viz. remedial action should invariably be initiated as a precautionary measure in respect of audit objections, even if the objection is not accepted by the Income-tax Officer or without the assessing authority applying his mind to such information for reaching his own conclusion. Once the remedial action is initiated, it can be dropped with the approval of the Commissioner of Income-tax if the objection raised is one of facts and the facts stated by the audit are found to be incorrect. Thus, contrary to the decision of the Supreme Court, the instruction of the Board directs that merely on raising of audit objection remedial action by initiating proceedings of reassessment be taken, notwithstanding that the authority vested with power to exercise jurisdiction for issuing notice is not satisfied about existence of such circumstances which may warrant exercise of such power. To say the least, such ultra vires instructions cannot be pressed into service to save the initiation of proceedings under section 147, in the absence of holding any belief by the Assessing Officer, by arrogating the power to itself by the Board by issuing such directions contrary to the provisions of law at the pain of subjecting the officer to pain of exposing him to charge of insubordination".

11. Thus, the settled legal position can be summarised, that :-

(a) There must be material for belief.

(b) Circumstances must exist and cannot be deemed to exist for arriving at an opinion.

(c) Reason to believe must be honest and not based on suspicion, gossip, rumour or conjuncture.

(d) Reasons referred must disclose the process of reasoning by which he holds "reason to believe" and change of opinion does not confer jurisdiction to reassess.

(e) There must be nexus between material and belief.

(f) The reasons referred must show application of mind by the Assessing Officer.

The validity of initiation of reassessment proceedings has to be judged with regard to the material available with the officer at the point of time of issue of the notice under section 148 and cannot be sought to be substantiated by reference to material that may have come to light subsequently in the course of reassessment proceedings."

12. If the aforesaid principles are applied to the facts of the present case it becomes amply clear that the impugned notices have been issued without jurisdiction , the revenue having failed to establish the jurisdictional fact of there being any omission or failure on the part of the petitioner assessee in disclosing full and true particulars of income necessary for the assessment of the assessment year under consideration. The petitioner was granted deduction of Rs.24,95,064/- in the aggregate under sections 80HH & 80I of the Act in the assessment framed on 25/3/1991. Thereafter, vide order dated 24/3/1993 the said assessment was set aside directing the Assessing Officer to carry out the necessary inquiry/verification and frame the assessment afresh on merits according to law after affording due opportunity to the assessee of being heard. We may note that the revisional proceedings initiated under section 263 of the Act were for the reasons which may be reproduced from the Commissioner's order dated 24/3/1993.

"2. On examination of the case records, it has been found that the assessing officer allowed deduction erroneously on account of the following :-

(i) The assessing officer has allowed

deduction u/s.80HH to the tune of Rs.12,47,532/- though the assessee has not filed form No.10C. Moreover, the business of the assessee is also not falling in the backward area.

(ii) The assessing officer has allowed deduction u/s.80I to the assessee even though the assessee has failed to file from No.10CCB alongwith the return. Moreover, none of the conditions prescribed in clause I and II of sub-section 2 are fulfilled. The assessee has also not furnished the details as per clause IV of Sub-section (Emphasis supplied).

13. After referring to the reply of the petitioner, the Commissioner held that audit reports in necessary forms had not been filed along with the return. Thereafter, in para 5 it was stated thus :

"5. As regards the other issues raised, it is mentioned here that the same have been dealt with in detail in my order dated 24/3/1993 passed in the case of the assessee for the assessment years 1988-89 and 1989-90 and in light of that further enquiries/verification need to be made on the issues involved ....."

14. In pursuance of the aforesaid order a fresh assessment was framed on 29/11/1994, whereby the deductions allowed in original assessment under sections 80HH and 80I were withdrawn to the extent of Rs.24,95,064/- in aggregate. As already stated herein before the petitioner carried the matter in appeal and vide appellate order dated 22/7/1996, the appeal was allowed and the Assessing Officer was directed to allow deduction under sections 80HH and 80I in the following terms by Commissioner of Income-tax,(Appeals-II), Rajkot:

"He is directed to allow deductions u/s. 80HH & 80I, if the appellant fulfills other conditions for admissibility of these deductions".

15. The respondent has filed affidavit-in-reply dated 28/3/2001 and annexed the reasons recorded for arriving at the belief that income has escaped assessment, which are in the following terms :

"The assessee firm is engaged in the manufacture

of Ayurvedic Medicine. The factory of the assessee firm is located at Nanbha Sheri, Bhavnagar. The assessee has claimed and was allowed deduction of Rs.12,47,512/- u/s. 80HH for AY 90-91. On careful study of notification no.S.O.165 dt.19-12-86 and Board's Circular No. 484 (Para-4) dt.1.5.97, it is noticed that Bhavnagar Urban Agglomeration is excluded from the list of eligible backward areas for dedn. u/s.80HH. Therefore, the incorrect allowance of deduction has caused under assessment to the extent of Rs.12,47,512/-. Re-opening of assessment on the basis of factual error pointed out by Audit was held to be valid as reported in 237 ITR 13(SC)(1999), 239 ITR 60(Mad), 242 ITR 64(Mad), 210 ITR 537(Madras)."(Emphasis supplied).

16. In the affidavit-in-reply the respondent has vide para 4 stated that the petitioner had overlooked the provisions of section 147 in its entirety and thereafter Explanation 1 to section 147 has been reproduced and it is stated :

"Thus, in the present case, the A.O. has not been able to detect from material on record that the assessee's production unit is located in an area which is not industrially backward and vide Notification read with circular mentioned above the assessee was not eligible for deduction u/s.80HH of the I.T.Act. Therefore, it is respectfully submitted that the conditions laid down in section 147 has been satisfied".

17. On careful consideration of the reasons recorded as well as the averments made in the affidavit-in-reply the following undisputed facts emerge :

(a) The assessment has been reopened at the behest of internal revenue audit party.

(b) The petitioner started production relevant to assessment during the financial year 1983-84 and claimed deduction for the first time u/s.80HH in the assessment year 1986-87.

18. The internal revenue audit party brought to the notice of the Assessing Officer that the production unit of the petitioner is located within the city of Bhavnagar

and hence condition of industrial undertaking being situate in backward area was not satisfied vide notification no.165 dated 19/12/1986; the same has also been annexed whereby it is stated that the eligible area for the district of Bhavnagar for the purpose of being considered as backward area will be the entire district excluding Bhavnagar Urban Agglomeration and lastly circular no.484 dated 1/5/1987 has been annexed.

19. When the matter was taken up for hearing on 10/4/2001, on the basis of the aforesaid notification, the reasons recorded and the averments made in the affidavit-in-reply, it was contended on behalf of the revenue that the petitioner was aware that its factory was situated in Urban Agglomeration Area of Bhavnagar City and hence, the petitioner was not entitled to claim deduction u/s.80HH as the necessary conditions were not fulfilled by the petitioner, and in such circumstances, the claim made by the petitioner was not true claim even if there was full disclosure, and hence reassessment proceedings were rightly initiated.

20. In response thereto, on behalf of the petitioner it was pointed out that the factual averments made in the affidavit-in-reply and the condition based thereupon raised on behalf of the revenue were not correct in as much as annexures, viz., notification, circular etc. were part of written submissions made by the petitioner assessee before the assessing officer at the time when the fresh assessment was framed in pursuance of revisional proceedings. It was further submitted that the Assessing Officer having applied his mind to the material on record, which was submitted by the petitioner, it was not open to the revenue to take a different view on reappraisal of the same material. It was in this context when it was pointed to the Court that the annexures annexed to the affidavit-in-reply formed part of the petitioner's written submissions before the Assessing Officer (and this was prima facie shown from the paging/numbering which tallied) that the original file of assessment proceeding was called for. At the time of hearing, on 1/5/2001 the learned Standing Counsel for revenue Mr.Akil Qureshi very fairly stated that the say of the petitioner was factually correct in as much as the annexures which formed part of the affidavit-in-reply were originally forming part of enclosures to the written submissions made on behalf of the petitioner before Assessing Officer when the assessment proceeding in the wake of revisional order were taken on hand, and hence it could not be stated that the petitioner had not putforth its claim in proper perspective after full and true

disclosure of all material facts.

21. As can be seen from the assessment order dated 29/11/1994, vide para 2 the Assessing Officer has recorded that in response to notice under section 143(2) of the Act, the petitioner's Advocate and partner appeared and filed written submissions vide letter dated 7/9/1994 along with evidences in support of the claim for allowability of the deduction under section 80HH & 80I.

22. It has already been noted that the revisional proceedings were initiated on two-fold counts, viz. (i) non filing of audit report in prescribed form along with the return and (ii) that the business of the petitioner was not falling in the backward area. The Commissioner in his revisional order under section 263 of the Act had specifically found that the audit reports in prescribed forms had not been filed along with the returns and in relation to the other issues on the basis of which the revision was initiated, the Assessing Officer had been directed to make further inquiries/verification and pass a fresh assessment order in accordance with law. It was in this context that the petitioner assessee had been called upon to substantiate its claim for deduction under section 80HH and 80I of the Act, and hence written submissions dated 7/9/1994.

23. Though it was not strictly necessary we have also gone through the Eighth Schedule as it was originally enacted, the notification dated 19/12/1986 which excluded Bhavnagar Urban Agglomeration Area from the district of Bhavnagar for the purpose of being designated as backward area and circular no. 484 dated 1/5/1987 so as to ascertain whether the petitioner was in fact entitled to deduction. Apparently the entire Bhavnagar district was listed as backward area in the Eighth Schedule as it originally stood and thereafter, vide Notification No.165 dated 19/12/1986, Bhavnagar Urban Agglomeration was excluded from such notified area and hence, if only the said Notification is looked at, it may appear that the petitioner would not be entitled to deduction as claimed. However, para 2 of circular no.484 dated 1/5/1987 which reads as under puts the entire situation beyond the pale of controversy :

> "2. In the interest of administrative convenience, it has been decided that the benefit of section 80HH in respect of any area will not be withdrawn retrospectively. The Taxation Laws (Amendment and Miscellaneous Provisions) Bill,1986, received the assent of the President

> on 10/9/1986. It is, therefore, clarified that notwithstanding the aforesaid notification, all areas specified in the Eighth Schedule will continue to enjoy the benefit of section 80HH in respect of an industrial undertaking which begins to manufacture or produce articles before September 10,1986 or in respect of the business of a hotel which starts functioning before September 10,1986."

Thus, it can be seen that an undertaking which begins to manufacture or produce articles before September 10,1986, even if it falls within excluded area would be entitled to continue to claim deduction under section 80HH of the Act. The facts as they existed on record are that the petitioner had started production during the financial year relevant to assessment year 1983-84, and hence it was an industrial undertaking which began to manufacture before 10th September,1986. Thus, the petitioner had correctly claimed the deduction under section 80HH of the Act.

24. However, the limited controversy before us was not as to whether the petitioner was entitled to deduction or not but whether there had been any omission or failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment year under consideration. In view of the facts and evidence which are already available on record, it is abundantly clear that there had been no failure or omission on the part of the petitioner. The petitioner had already putforth its claim in entirety and supported the same on the basis of circular which formed part of the written submissions made before the Assessing Officer during the course of assessment proceedings which culminated in assessment order dated 29/11/1994. The Assessing Officer has also taken note of such written submissions in his assessment order and thus it cannot be stated that there was any non application of mind on the part of the Assessing Officer.

25. The respondent has stated in his affidavit-in-reply that Assessing Officer has not been able to detect from the material on record that the assessee's production unit is located in an area which is not notified as backward. It is further stated in the affidavit-in-reply "in the instant case, the Assessing Officer has erred on facts as to whether the assessee's production unit falls in a backward area eligible for deduction u/s.80HH and the same was pointed out by the audit party and therefore, his action is justified."

26. Therefore, even from the affidavit-in-reply it is absolutely clear that there had been no omission or failure on the part of the petitioner but it is the say of the Respondent that the Assessing Officer had committed an error. Without entering into the controversy as to whether there was any error committed by the Assessing Officer or not, suffice it to state that as the assessment is sought to be reopened after a period of four years and there is admittedly no omission or failure on the part of the petitioner, the Assessing Officer i.e. the respondent cannot assume jurisdiction under section 147 of the Act.

27. There is one more aspect of the matter. As we have already stated the annexures to the affidavit-in-reply formed part of the petitioner's written submissions before the Assessing Officer. However, an impression was sought to be created that the relevant notification etc., had not been taken into consideration by the petitioner before making claim for deduction u/s.80HH of the Act, and hence the audit party had pointed out a factual omission or failure on the part of the petitioner which would entitle the respondent to assume jurisdiction to reopen the completed assessment. The facts as they exist on record are otherwise and we strongly deprecate the attempt on behalf of the revenue to support an action which is otherwise not defendable at all. The action of the respondent in referring to the notification etc., as if it was pointed out by the internal revenue audit party is to say the least, an attempt to mislead the Court and is not expected from an officer of the rank of Joint Commissioner of Income-tax.

28. At this juncture we may reiterate the settled legal position as regards the role of the Assessing Officer :

(i) Though the Income Tax Officer is not a Court, and he is not bound to follow the procedure of a Court yet he is to some extent party or judge in his own case and hence is required to proceed in a judicial spirit and come to a judicial conclusion upon properly ascertained facts.(3 ITC 198, Messrs. Harmukhari Dulichand Vs. The Commissioner of Income Tax, Bengal).

(ii) The fact that the Income Tax Officer is "a judge in his own cause" has at times and amongst certain section of the General Public caused uneasiness and anxiety is felt lest the position of such autocratic power by official of a department may sometime result in

injustice or hardship being done to those upon whom the assessments are made. (5 ITC 352 - Abdul Baree Chowdhury Vs. Commissioner of Income Tax, Burma).

(iii) The Income Tax Department must always bear in mind that the normal presumption is in favour of good faith and not otherwise on part of the assessee. That the proceedings before Income Tax Officer are not judicial proceedings in the sense in which this term is ordinarily used, and all that is required of him is to proceed without bias and give sufficient opportunity to the assessee to place his case before him, or in other words, to conduct himself in accordance with rules of justice, equity and good conscience. (5 ITR 464 - Ganga Ram Balmokand Vs. Commissioner of Income Tax, Punjab).

29. The respondent instead of acting in a judicial spirit and in accordance with rules of justice, equity and good conscience has proceeded to act with bias and has adopted a role of prosecutor more than that of a Judge. He should have refrained from doing so.

30. On behalf of the revenue, Mr.Qureshi relied upon the Supreme Court decision in the case of CIT Vs. P.V.S. Beedies Pvt.Ltd., 237 I.T.R.13. On going through the said decision we find that in the said case the audit party had merely pointed out a fact which had been overlooked by the Income-tax Officer in the assessment. As can be seen from the facts on record of the present case that is not the situation in the present case.

31. To conclude : (i) the petitioner had disclosed all the primary facts necessary for the purpose of the assessment, (ii) on the facts there was no material for holding a belief and the respondent could not have reason to believe that there was any escapement of Income chargeable to tax, (iii) the reasons recorded show that instead of independent application of mind the Assessing Officer merely chose to adopt the line of action pointed out by the internal revenue audit, (iv) the entire affidavit-in-reply goes to show that though the respondent was aware that there was no omission or failure on the part of the petitioner, the recording of reasons was a colourable exercise for assumption of jurisdiction.

32. In view of this fact situation, all the three petitions are allowed. We hereby quash and set aside the impugned notices dated 5/2/2001 (Annexure "A"). Rule made absolute. The revenue shall pay the costs of the

petitions at Rs.2500/- each.

Sd/- Sd/-
(B.C.Patel,J) (D.A.Mehta,J)

m.m.bhatt